



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

February 21, 2003

Mr. Richard A. Streiber
Escamilla & Poneck, Inc.
P.O. Box 200
San Antonio, Texas 78291-0200

OR2003-1152

Dear Mr. Streiber:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176855.

The Harlandale Independent School District (the "district"), which you represent, received a request for "[t]he appraisal report prepared for the [district] by Integra Realty Resources for the approximately 102.363 acre tract owned by the [district.]" The request also sought "[a]ny other appraisal of the above-noted tract prepared by or for the [d]istrict within three years preceding the date of this letter." You claim that the requested information is excepted from disclosure under sections 552.104 and 552.105 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

As a preliminary matter, we note that you have failed to fully comply with section 552.301 of the Government Code. Under section 552.301(b), a governmental body that receives a request for information that it wishes to withhold from public disclosure must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. You indicate that the district received this request on December 2, 2002. Therefore, you were required to submit your request for a decision, stating the exceptions that apply, by December 16, 2002. Although you timely submitted your initial request for a decision to this office, we note that in your brief of December 20 2002, you raise section 552.104 as an additional exception to disclosure. Sections 552.104 is a discretionary exception that protects the governmental body's interests and may be waived. *See* Open Records Decision Nos. 592 at 8 (1991) (predecessor to section 552.104 is designed

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

to protect interests of governmental bodies and not interests of third parties); 522 at 4 (1989) (discretionary exceptions in general). In this instance, we find that you did not timely raise section 552.104 and have therefore waived this exception.

We next note that most of the submitted information is subject to section 552.022 of the Government Code. This section provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

The submitted information consists primarily of excerpts from a completed report made for the district that is expressly public under section 552.022(a)(1) unless it is excepted under section 552.108 or confidential under other law. You assert that this information is excepted under section 552.105. However, section 552.105 is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions in general). Thus, this report, which we have marked, may not be withheld under section 552.105.

We next address your arguments under section 552.105 of the Government Code for the remaining information. Section 552.105 excepts from disclosure information relating to:

(1) the location of real or personal property for a public purpose prior to public announcement of the project; or

(2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 protects a governmental body's planning and negotiating position with respect to particular transactions. *See* Open Records Decision No. 564 at 2 (1990). This exception protects information relating to the location, appraisal, and purchase price of property until the transaction is either completed or canceled. *See* Open Records Decision Nos. 357 at 3 (1982), 310 at 2 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" *See* ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state that the district “has been pursuing the sale of the land and has previously solicited bids from interested parties.” In addition, you represent that the district has made a good faith determination that release of the submitted information “would damage its planning and negotiating position with respect to the real estate.” Based on your representations and our review of the remaining submitted information, we believe that you have demonstrated that section 552.105 protects the remaining submitted information, and it may be withheld pursuant to this exception. *See also* Open Records Decision No. 291 (1981) (concluding that statutory predecessor protected governmental body’s application to federal Department of Housing and Urban Development for federal funding).

Finally, we note that the report that is subject to section 552.022 may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district must release the completed appraisal report in accordance with section 552.022 but in so doing must comply with any applicable copyright laws. The remaining responsive information may be withheld pursuant to section 552.105.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental

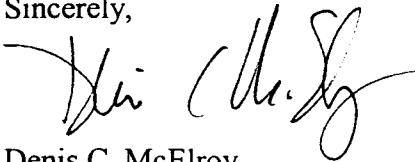
body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 176855

Enc. Submitted documents

c: Mr. Steven Arronge
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(w/o enclosures)